

BRB No. 04-0152 BLA

CHARLES R. BROWN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 10/29/2004
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision on Motion for Reconsideration and the Decision and Order on Second Remand - Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision on Motion for Reconsideration and the Decision and Order on Second Remand - Denying Benefits (95-BLA-2525) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq.* (the Act).¹ Claimant filed the instant claim, his third claim, on October 19, 1994. Director's Exhibit 1. On original consideration, the administrative law judge found, based on employer's concession that claimant established a totally disabling respiratory impairment, that claimant thereby established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). The administrative law judge further determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203 (2000), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and (b) (2000). The Board affirmed the administrative law judge's Decision and Order Awarding Benefits dated March 28, 1997. *See Brown v. Consolidation Coal Co.*, BRB No. 97-1016 BLA (Apr. 29, 1998) (unpub.). The United States Court of Appeals for the Fourth Circuit vacated the Board's decision on the grounds that the administrative law judge's analysis of whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) was not in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *See Consolidation Coal Co. v. Brown*, No. 98-1923 (4th Cir. Sept. 26, 2000) (unpub.). The Fourth Circuit remanded the case for the administrative law judge to properly weigh all of the relevant evidence together under *Compton* to determine whether claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a).² *Id.*

In a Decision and Order On Remand – Awarding Benefits dated April 25, 2001, the administrative law judge awarded benefits, finding that claimant established the existence of pneumoconiosis based on the x-ray and CT scan evidence at 20 C.F.R. §718.202(a)(1) and (a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). On June 25, 2002, the Board vacated the administrative law judge's award of benefits, and remanded the case for the administrative law judge to

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

² In its petition for review, employer argued that the administrative law judge had not properly considered the negative CT scan evidence along with the medical reports and deposition testimony of Drs. Renn, Morgan, and Jaworski relevant to the existence of pneumoconiosis. The Fourth Circuit specifically found that, "Because the ALJ did not adequately explain why he found the x-ray evidence more persuasive than the CT scan evidence, crediting Dr. Jaworski's opinion in part on the basis of the x-ray evidence is suspect." *See Consolidation Coal Co. v. Brown*, No. 98-1923 (4th Cir. Sept. 26, 2000) (unpub.), slip. op. at 3.

more fully explain the weight he assigned each piece of evidence at 20 C.F.R. §718.202(a). *See Brown v. Consolidation Coal Co.*, BRB No. 01-0712 BLA (June 25, 2002) (unpub.). The Board directed the administrative law judge to fully discuss his rationale for crediting the opinion of Dr. Jaworski, in light of the inconsistencies in the physician's various medical reports. *Id.* The Board further stated that the administrative law judge should consider whether Dr. Jaworski's various medical opinions were sufficiently reasoned and valid based on the objective studies conducted. *Id.*

In a Decision and Order on Second Remand – Denying Benefits dated April 30, 2003, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge stated that he credited the negative CT scan evidence over the positive weight of the x-ray evidence because he considered the CT scan to be a superior tool for detecting the presence or absence of pneumoconiosis. In weighing the medical opinion evidence as to the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge assigned greater probative weight to the opinions of Drs. Fino, Morgan, and Renn, who opined that claimant did not have pneumoconiosis based on the negative CT scan evidence. In weighing Dr. Jaworski's opinion the administrative law judge stated:

In his deposition testimony on July 21, 1995, Dr. Jaworski reiterated that the CT scan did not show any changes consistent with coal worker's (sic) pneumoconiosis (EX 1, p. 20). However, Dr. Jaworski stated that "high resolution CT [s]can is not the best type of tool to look for coal worker's (sic) pneumoconiosis." He added that it is not commonly used to differentiate between coal worker's (sic) pneumoconiosis, asbestosis, and pulmonary fibrosis. Furthermore, Dr. Jaworski stated that there is no standardized CT scan evaluation, as opposed to the ILO classification system for a plain chest x-ray (EX 1, pp. 20-22). On the other hand, Dr. Jaworski acknowledged that CT scans allow for a much more detailed examination of the lung tissue and that CT scans are much more sensitive than plain chest x-rays (EX 1, pp. 21-23).

Decision and Order on Second Remand at 11-12. The administrative law judge found that claimant failed to meet his burden of establishing the existence of pneumoconiosis because he found the testimony of Drs. Morgan and Renn persuasive regarding the superiority of the high resolution CT scan over the plain x-ray with regard to the issue of legal pneumoconiosis. The administrative law judge also found Dr. Jaworski's opinion insufficient to satisfy claimant's burden of proof, noting that Dr. Jaworski opined in a November 11, 1993 report that claimant may be suffering from interstitial lung disease of unknown etiology since claimant's chest x-rays showed a predominant amount of irregular opacities that were not typically seen with pneumoconiosis. Dr. Jaworski, however, subsequently testified at his deposition held on July 21, 1995 that the "best

diagnosis" was idiopathic pulmonary fibrosis, with the possible contribution of coal workers' pneumoconiosis, since the CT scan evidence did not necessarily support a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 1 at 37. Dr. Jaworski further opined that it was impossible to know whether the results of claimant's arterial blood gas studies showing a drop in PO₂ were attributable solely to the idiopathic process or to a combination of two disease processes, namely idiopathic fibrosis and coal workers' pneumoconiosis. Employer's Exhibit 1 at 54. Given Dr. Jaworski's various statements, the administrative law judge found that Dr. Jaworski's opinion was equivocal and determined that the opinions of Drs. Fino, Morgan, and Renn were more consistent with the probative objective clinical tests that showed no evidence of pneumoconiosis. Decision and Order on Second Remand at 13. The administrative law judge also found, assuming *arguendo* that claimant had pneumoconiosis, that Dr. Jaworski's opinion was insufficient to establish that pneumoconiosis was a substantially contributing cause of claimant's totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant next filed a Motion for Reconsideration with the administrative law judge on May 27, 2003, arguing that insofar as Dr. Jaworski's opinion was found equivocal by the administrative law judge as to the existence of pneumoconiosis, then the administrative law judge must find that claimant did not receive a complete and credible pulmonary evaluation as contemplated by 30 U.S.C. §923(b) and the Board's holding in *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

The administrative law judge issued a Decision on Motion for Reconsideration on September 24, 2003. The administrative law judge addressed the issue of whether claimant had received a complete pulmonary evaluation, noting that the Director, Office of Workers' Compensation Programs (the Director), had submitted a June 25, 2003 letter in response to claimant's motion for reconsideration. The administrative law judge set forth the Director's opinion as follows:

If the Court interpreted Dr. Jaworski as stating that he was unable to reach a definitive conclusion as to the etiology of claimant's pulmonary condition, then the Director satisfied his obligation. The Director's obligation under Section 923(b) does not require a physician to reach a definitive conclusion when the evidence does not warrant such a conclusion.... On the other hand, if the Court meant that Dr. Jaworski's opinions – including the December 1994 evaluation on behalf of the Director – are not credible because they reached differing conclusions, then the Director has not satisfied his obligation.

Decision on Motion for Reconsideration at 2. The administrative law judge then explained that his finding contained in the Decision and Order on Second Remand, that Dr. Jaworski's opinion was equivocal, matched the first possibility:

In labeling Dr. Jaworski's medical reports, office notes and testimony regarding the presence or absence of pneumoconiosis as "ambiguous and equivocal," I intended to convey my finding that Dr. Jaworski's many statements in evidence showed that he never reached a definitive conclusion about whether [c]laimant has pneumoconiosis. Dr. Jaworski's inability to reach a single answer in [c]laimant's case does not discredit him as a physician; instead, if *examinations and testing* did not definitively show the etiology of [c]laimant's *pulmonary condition*, then Dr. Jaworski's opinion *stating as much is entirely valid*.

Id. (emphasis added). The administrative law judge thus found that the Director had satisfied his obligation to provide claimant with a complete pulmonary evaluation and denied claimant's motion for reconsideration.

Claimant appeals, arguing that he is entitled to a new pulmonary evaluation in light of the administrative law judge's determination that Dr. Jaworski's opinion is equivocal as to the existence of pneumoconiosis. Claimant also asserts that he has established total disability due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. Employer alternatively argues that if the case is remanded for a new pulmonary evaluation, then it "suffers prejudice and has been denied a meaningful hearing at a meaningful time." Employer's Response Brief at 12. Employer points out that claimant only raised the issue of the sufficiency of Dr. Jaworski's opinion in response to the administrative law judge's denial of benefits and argues that claimant's request for a "do-over" at such late date is incompatible with notions of due process.³ Employer's Brief at 12. Employer further maintains that any liability for benefits should transfer to the Black Lung Disability Trust Fund (the Trust Fund) since employer justifiably relied on the Director's compliance with regulatory demands only to find out at this late date that the Director's duties were not properly discharged. The Director has filed a response brief, arguing that claimant received a complete pulmonary evaluation, as Dr. Jaworski merely opined that he could not provide a definitive opinion. The Director also replies to employer's response brief, and contends that employer would not be prejudiced by a remand of this case since employer would

³ Employer maintains that claimant is not entitled to a new pulmonary evaluation simply because Dr. Jaworski's opinion was most recently found not to be favorable to his case. Employer argues that what claimant is actually asking the Board to do is to remand the case for a new and "favorable" pulmonary evaluation. Employer's Brief at 11.

have the right to submit responsive rebuttal evidence if claimant were to receive a new pulmonary evaluation and if employer wished to pursue further medical development. The Director further argues that employer did not explain how it relied to its detriment on Dr. Jaworski's opinion or how it would be specifically prejudiced if claimant were permitted a new pulmonary evaluation. The Director also opposes employer's argument that any liability for benefits must transfer to the Trust Fund.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. See 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges*, 18 BLR at 1-84.

Claimant argues that since the administrative law judge found Dr. Jaworski's opinion was "ambiguous and equivocal" regarding the existence of pneumoconiosis, then the administrative law judge erred by not remanding the case to the district director to provide claimant with a complete and credible pulmonary evaluation, as required by Section 413(b) of the Act, 30 U.S.C. §923(b).

Claimant's argument is without merit. In accordance with the Board's remand instructions, the administrative law judge reevaluated the opinion of Dr. Jaworski in light of the various opinions in his reports⁴ and found that Dr. Jaworski's opinion was

⁴ Dr. Jaworski diagnosed "probable" mild simple pneumoconiosis by x-ray evidence. Director's Exhibit 11. He opined in a November 11, 1993 report that claimant may be suffering from interstitial lung disease of unknown etiology since claimant's chest x-rays showed a predominant amount of irregular opacities that were not typically seen with pneumoconiosis. Director's Exhibit 23. Dr. Jaworski later testified at his deposition held on July 21, 1995, that the "best diagnosis" was idiopathic pulmonary fibrosis with the possible contribution of coal workers' pneumoconiosis, although the CT scan evidence did not necessarily support a diagnosis of coal workers' pneumoconiosis. Employer's Exhibit 1 at 37. He further stated that it was impossible to know whether the

insufficient to carry claimant's burden of establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge clarified in his Decision on Motion for Reconsideration that Dr. Jaworski's opinion was not rejected on the basis that it was "equivocal." Rather, the administrative law judge explained that he found, consistent with the example provided by the Director, that "Dr. Jaworski's many statements in evidence showed that he never reached a definitive conclusion about whether [c]laimant has pneumoconiosis." Decision on Motion for Reconsideration at 2. The administrative law judge specifically stated that "Dr. Jaworski's inability to reach a single answer in [c]laimant's case does not discredit him as a physician: instead, if examinations and testing did not definitively show the etiology of claimant's pulmonary condition, then Dr. Jaworski's opinion stating as much is entirely valid." *Id.*

As the trier of fact, the administrative law judge has broad discretion to assess the medical evidence and to draw his own conclusions regarding the credibility of the medical experts. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR1-67 (1986). To the extent that the administrative law judge found that Dr. Jaworski was a credible physician who offered an opinion on the requisite elements of entitlement in claimant's case, we find no basis for remanding the case for a new pulmonary evaluation. We therefore hold that the Director satisfied his obligation under the Act to provide claimant with a complete credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges*, 18 BLR at 1-84.

Furthermore, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge determined, in his Decision and Order on Second Remand, that the evidence weighed together did not establish the existence of pneumoconiosis, particularly given the weight of the negative CT scan evidence and the credible medical opinions finding that claimant did not have clinical or legal pneumoconiosis. The administrative law judge found that Dr. Jaworski specifically testified that the CT scan evidence did not show any changes consistent with coal workers' pneumoconiosis. Employer's Exhibit 1. The administrative law judge credited the CT scan evidence as more probative than the x-ray evidence for diagnosing the existence of pneumoconiosis and further credited the medical opinions of Drs. Renn and Fino, who based their opinions that claimant did not have pneumoconiosis in part on the CT scan evidence versus the positive x-ray evidence. The administrative law judge properly found that Dr. Jaworski was unable to reach a definitive conclusion as to the etiology of claimant's

results of claimant's arterial blood gas studies showing a drop in PO₂ were attributable solely to the idiopathic process or a combination of two disease process, namely idiopathic fibrosis and coal workers' pneumoconiosis. Employer's Exhibit 1 at 54.

respiratory impairment as demonstrated by the objective testing, and therefore, that claimant was unable to establish legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

For the foregoing reasons, we therefore affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis based on a weighing of all of the relevant evidence at 20 C.F.R. §718.202(a).⁵ Because claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement, a finding of entitlement is precluded. *See Trent*, 11 BLR at 1-26; *Perry*, 9 BLR at 1-1.

Accordingly, the Decision on Motion for Reconsideration and the Decision and Order on Second Remand - Denying Benefits of the administrative law judge are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁵ Based on our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we decline to address claimant's arguments with respect to the issue of disability causation under 20 C.F.R. §718.204(c).